# No. 12,452

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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SAM GALBREATH,

*Appellant,*

vs.

THE HOMESTEAD FIRE INSURANCE COMPANY and SUN INSURANCE OFFICE, LIMITED,

*Appellees.*

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## APPELLANT'S OPENING BRIEF.

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### STATEMENT OF THE CASE.

This was an action brought to recover money paid by plaintiff insurance companies to the Herold Lumber Company (hereinafter referred to as the insured) under fire insurance policies issued by plaintiffs, based upon the alleged negligence of defendant's employees in the partial installation, controlling and testing of an oil burning stove.

## JURISDICTION.

The jurisdiction of the District Court is based upon diversity of citizenship, as provided for in U.S. C.A., Title 28, Sec. 1332, the complaint alleging that the two plaintiff corporations were respectively citizens of Maryland and of England (Tr. pp. 2, 5) and that the defendant is a citizen of California (Tr. p. 3); it was further alleged, bringing this action within the section of the statute last referred to, that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00. (Tr. pp. 3, 5.) In accordance with the provisions of U.S.C.A., Title 28, section 1393, the action was brought in the division of the District Court wherein the defendant Galbreath resides.

Appellate jurisdiction herein is founded upon U.S.C.A., Title 28, secs. 1291 and 1294.

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## SPECIFICATION OF ERRORS.

1. Insufficiency of the evidence to justify the decision and verdict of the District Court of the United States, for the Northern District of California, Northern Division.

2. That the decision and verdict of the District Court of the United States is against the law.

3. That the Court erred in finding that the fire was proximately caused by the stove.

4. Plaintiffs did not establish that the instrumentality complained of, the stove and its accessories, were under the exclusive control of the defendants.

5. As a general rule, the destruction of property by fire does not raise the presumption of negligence.

6. A stove is not an inherently dangerous article and the *"res ipsa loquitur"* doctrine is not applicable.

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**STATEMENT OF THE FACTS.**

The testimony of plaintiffs' witnesses at the trial showed that one Roy Albers, an employee of the insured, picked up the stove in question at the defendant's place of business on October 31, 1946, and delivered it, still crated, to the office of the insured, there placing it behind a counter. (Tr. pp. 27-28.) He had no conversation with defendant or his agents as to how to install the stove, nor did he take delivery of any stovepipe or fittings or connections therefor. (Tr. pp. 31-32.) Charles Little testified that about a week prior to October 31st, acting as agent for the insured, he purchased from the defendant a "Custom Aire" stove, which was paid for by the purchaser. (Tr. pp. 38-39.) After delivery of the stove to Albers, it remained out of the possession of the defendant, and in possession of the insured.

Plaintiffs' exhibits (1) and (3) show a sale from the defendant to the insured of a "Custom Aire" stove for the price of $56.88, and of an oil drum, stove oil, bushings, valve, fittings and copper tubing,

for a sales price of $14.20; but nowhere is there shown a sale of any stovepipe nor of a flue for a damper for the stove.

Plaintiffs' witness Charles Little also testified (Tr. p. 61) that one of the employees of Lars Wold, a contractor employed by the insured, built the platform on which the oil drum was placed; and this same witness himself directed the defendant's employee (later shown to be Cerino Lemos) where to place the barrel of oil and to run the connecting tubing under the foundation of the building. Little also testified that the office wherein Albers placed the stove had been painted the day previously with Standard Oil floor hardener, an inflammable material. (Tr. pp. 56, 63); and he further showed that the defendant Galbreath had nothing to do with the installation of the chimney to which the stove was connected (Tr. p. 61), and that defendant made no charge for the installation of the stove itself (Tr. p. 55), although the insured was billed for the materials, excepting for the stovepipe, damper and flue, used in connection therewith. (Tr. p. 47.) By the witness, Jack Little, also employed by the insured and who was in the office at the time the fire started, plaintiffs adduced evidence that Harry Gregory, an employee of the defendant, threw a match into the stove, that there was a sort of a puff, and then a square of fire under the stove. (Tr. pp. 66, 67.) This witness also stated that the stove had been going before that time, basing his statement on the fact that it was warm in the office. (Tr. p. 69.) Plaintiffs then called

the defendant under Rule 46-A of the Civil Procedure Act, and proved by him that said defendant's agent Lemos had been directed to deliver fittings for the stove to the insured (Tr. p. 81), but that he had not been directed by defendant Galbreath to install it and that his acts were those of a volunteer. (Tr. p. 85.) This was virtually the sum and substance of plaintiff's case.

The defendant, testifying in his own behalf, stated that when purchasing the stove for the insured, Charles Little did not ask that it be installed (Tr. p. 92), and that Lemos was directed merely to deliver the oil container, place it upon the stand and fill it (Tr. p. 94); he was not to install the stove nor the chimney. (Tr. p. 99.) In this, he was corroborated by Cerino Lemos (Tr. p. 104), and such testimony stands uncontradicted in the record. Lemos further testified that some carpenters were building the frame for the oil drum when he arrived at the insured's premises and that while he was waiting for them to complete this work he crawled under the building and laid out some copper tubing. (Tr. p. 105.) This he ran to a hole in the floor drilled by one of insured's employees; and someone, assumed by witness to be one of the carpenters, but not shown to have been even remotely connected with the defendant, pulled the tubing up through the hole in the floor. (Tr. p. 106.) During this time Lemos also observed that there were men in the office, painting the walls (Tr. p. 107); and it was shown by the testimony of the contractor, Lars Wold, a disinterested

witness, that these painters were employed by Little, as agent of the insured. (Tr. p. 120.) Lemos also testified that some workmen were erecting the chimney (Tr. p. 109), and, again, he was corroborated by Wold (Tr. p. 122), who stated also that he (Wold) installed the flue. Returning to the activities of Lemos, it was shown that he hooked up the copper tubing to the oil drum and filled it (Tr. p. 107); he noticed in the office that the stove was apparently installed, the stovepipe in place and the copper fuel line connected to the carburetor of the stove. But Lemos did none of this work. (Tr. p. 111.) Lemos stated that he then lit a match, started the stove, and for some five or ten minutes observed that it was burning properly. (Tr. pp. 111, 112.) Defendant's witness Harry Gregory denied (Tr. p. 139) that he had thrown a match into the stove.

After hearing all of the evidence, the Court below made findings of fact in favor of the plaintiffs and entered judgment thereon, from which this appeal is taken.

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### THE COURT ERRED IN FINDING THAT THE FIRE WAS PROXIMATELY CAUSED BY THE STOVE.

As was concisely stated by the Nebraska Court in *Watenpaugh v. L. L. Coryell & Son,* 283 N.W. 204:

> "* * * It is not enough merely to show that a fire actually occurred and that plaintiff's personal property was injured thereby, but plaintiff must go further and show that the proximate cause of the happening of the fire and the con-

sequent damages to plaintiff's property was the negligence of the defendant in one or more of the particulars claimed."

Now, in this case, the only testimony on the subject is that a fire was ignited in the stove and was burning properly when suddenly a fire appeared on the wall or floor in the vicinity of the stove. There is a dearth of testimony of any kind to show how the fire was or could have been communicated from the inside of a steel encased stove to the wall or floor, except solely by surmise or conjecture. It is as reasonable, for all that appears in the record, that the fire was caused by a defective flue, a burning cigarette, a carelessly thrown match, spontaneous combustion of a painter's rag, or ignition of the Standard Oil floor hardener then being applied which was known to be highly inflammable when exposed to normal heat, or by the either voluntary or careless act of a third person. There is here a clear analogy to the situation before the California Court in *White v. Spreckels,* 10 Cal. App. 288, where it was said:

> "There is nothing to show that the explosion was caused solely by too great a pressure of steam in the radiator. In fact there was no such allegation in the complaint. The thing which injured the plaintiff was the escaping steam. It escaped for the reason that the radiator exploded. The cause of the explosion is a matter of conjecture from the evidence in the record."
>
> "If we rely on the doctrine of probabilities we might as reasonably infer that the explosion

> was caused by the use of wet towels upon the radiator (that were placed there to dry), or by reason of the radiator having been changed or weakened by its use by the lessee, or that it was caused by an excessive pressure of steam."

So, here, leaving for the moment the applicability of the doctrine of *res ipsa loquitur* which will be later discussed, there is nothing to show that any negligence on the part of defendant was the cause of the fire, and

> "* * * The mere fact that an accident has occurred does not of itself result in any inference of negligence as against a defendant."
>
> *Hubbert v. Aztec Brewing Co.,* 26 Cal. App. (2d) 664, 687.

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**THE DOCTRINE OF RES IPSA LOQUITUR CANNOT BE APPLIED TO THE INSTANT CASE.**

As already noted, plaintiffs have failed to show the cause of the fire; and the rule is well established in California, as shown by the case of *Gerhart v. Southern Cal. Gas Co.,* 56 Cal. App. (2d) 425, 431:

> "* * * when it appears that the injury was caused by one of two causes for one of which the defendant is responsible, but not for the other, plaintiff must fail, if the evidence does not show that the injury was the result of the former cause, or leaves it as probable that it was caused by one or the other. (Citing cases.)"

And, as stated in *Biddlecomb v. Haydon,* 4 Cal. App. (2d) 361, 364:

"* * * neither does it (the *res ipsa loquitur* doctrine) apply where the cause of the accident is unexplained and might have been due to one of several causes for some of which the defendant is not responsible."

Applying these rules to the instant case we find (taking plaintiff's evidence) that the only testimony relative to the cause of the fire was that Gregory mopped up the floor under the stove (for a purpose not shown), threw a match into the stove; a short interval of time elapsed and there was a sort of a puff, a square of fire appeared under the stove, and the fire then spread to the walls. It is important to note that the defendant Galbreath testified, and in this he was not contradicted by any witness, that the oil drum did not burn or explode. (Tr. p. 98.) From this, it seems a reasonable and inescapable inference that the cause of the fire was not the oil drum. But plaintiffs still have not shown any facts sufficient to serve as a basis for an inference of negligence on the part of defendant; at best, they have left the cause of the fire a matter merely of guess, surmise and conjecture. It is equally likely that the fire was started by a cause other than the stove; for instance, as previously briefly noted, a common cause of fires is a defective chimney or flue. Such may well have been the case here. Also, it is a matter of common knowledge that paint saturated rags are ordinarily used by painters, and that such rags are subject to spontaneous combustion. Most significant, too, is the testimony that the office had been painted the day

before and even on the day of the fire, with a highly inflammable substance; it must be borne in mind that the defendant was in no way connected with these painting operations or the installation of the chimney or flue. It is at least equally to be inferred that the careless act of one of the many workmen shown to have been in and about the premises in close proximity to this inflammable matter caused the fire, as to be inferred that it was in some manner—unexplained by any of the evidence—caused by the stove.

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PLAINTIFFS DID NOT ESTABLISH THAT THE INSTRUMENTALITY COMPLAINED OF, THE STOVE AND ITS ACCESSORIES, WERE UNDER THE EXCLUSIVE CONTROL OF THE DEFENDANTS.

It is elemental that

> "* * * the rule (of *res ipsa loquitur*) applies only where the instrumentality at the time of the accident was under the *exclusive control* of the defendant, and that is the interpretation which has been applied by our courts without exception. Where there is a division of responsibility in the use or management of the instrument which causes the injury, and such injury might in equal likelihood have resulted from the separate act or acts of either one of two or more persons, the *res ipsa loquitur* doctrine cannot be invoked against any one of them. (Citing cases.)"

*Gerber v. Faber,* 54 Cal. App. (2d) 674, 685.

This same rule has been applied by the California Courts to cases involving an explosion.

*Biddlecomb v. Haydon, supra;*
*Hubbert v. Aztec Brewing Co., supra;*
*Weaver v. Shell Oil,* 13 Cal. App. (2d) 643, 645-647;
*Gerhart v. Southern Cal. Gas Co., supra.*

Here, the evidence conclusively establishes that title and possession of the stove was transferred from the defendant to the insured, who hauled the stove from defendant's premises and the insured installed it in the office of the insured's lumber yard; that not one joint of stovepipe was sold or installed by the defendant; that the stove was set up and pipe installed by men in the lumber yard who were not agents or employees of the defendant; that the flue was not installed by Galbreath or his agents, but rather by an independent contractor employed by the insured; that the defendant gave no instructions to his agents to install the stove; that the fuel line was not connected to the stove by Galbreath or any person under his direction; that the frame for the oil drum was not built by Galbreath; that the inflammable paint was not furnished or applied by Galbreath; that the carburetor on the stove was not adjusted by him or his agent; that the origin and installation of the damper is not established by the evidence; that at least five other persons, or groups of persons, are thus shown to have had some degree of control and management—Wold, the contractor, who built the platform for the oil drum and installed the

flue, the painters (employed by the insured), who were working about the office, the workmen who connected up the copper tubing to the stove, those who installed the chimney, and, finally, the insured who, by virtue of its ownership, had the right of control over the stove. In this regard, the following language, quoted from *Gerhart v. Southern Cal. Gas Co., supra,* is pertinent.

> "* * * It is contended * * * that regardless of the control of the other instrumentalities, such as the pipes, fittings, vault, meter and valves, the 'thing' or instrumentality causing the explosion was the gas itself; * * * We are unable to adopt the narrow interpretation placed upon this rule by respondent under the facts here disclosed. A defective or leaking pipe or connection from which the gas must of necessity have escaped in the pit or vault should be considered to be at least one of the 'instrumentalities' or 'things' referred to in the rule * * *. It has often been held that where all of the instrumentalities which might have caused an accident were not under the control of the defendant, the doctrine cannot apply * * *."

To the same effect, with regard to two or more instrumentalities, not all of which are under the control of a defendant, see *Godfrey v. Brown,* 220 Cal. 57. Having failed to show that the defendant was in exclusive control and management of the instrumentality which caused the injury, the plaintiff cannot here rely upon the doctrine of *res ipsa loquitur*, and, there being neither pleading nor proof of any specific act of negligence, the plaintiff cannot

recover, once the inference raised by the doctrine is out of the case.

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**AS A GENERAL RULE, THE DESTRUCTION OF PROPERTY BY FIRE DOES NOT RAISE THE PRESUMPTION OF NEGLIGENCE.**

As a general rule, the destruction of property by fire, either upon the premises where it starts or is kindled or on the other property to which it is communicated, does not raise a presumption of negligence in either the kindling or management of the fire.

*Keithley v. Hettinger,* 157 N.W. 897 (Minn.);
*Kapros v. Pierce Oil Co.,* 25 S.W. (2d) 777 (Mo.);
*Blackburn v. Norris,* 189 N.E. 262 (Ohio);
*Kendall v. Fordham,* 9 P. (2d) 183 (Utah);
*Barrickman v. Marion Oil Co.,* 32 S.W. 327 (W. Va.).

"A fire will be presumed to have been accidental upon mere proof of the burning."

*Bines v. State,* 45 S.E. 376 (Ga.);
*State v. Picnick,* 90 P. 945 (Wash.).

In California, the legal concept of *res ipsa loquitur* has never been extended to common fires and the basic fundamental civil rules of burden of proof and preponderance of evidence prevail in this jurisdiction. In

*Watenpaugh v. L. L. Coryell & Son,* 283 N.W. 204 (Neb.),

it was held:

"The gist of this action is negligence. It is not enough merely to show that a fire actually occurred and that plaintiff's personal property was injured thereby, but plaintiff must go further and show that the proximate cause of the happening of the fire and the consequent damages to plaintiff's property was the negligence of the defendant in one or more of the particulars claimed.

"No presumption of negligence either in the kindling or management of the fire is raised by the destruction of property by it.

" 'In action for damage by fire, alleged to have spread from defective stove in adjoining building, judgment for plaintiff could not be sustained where there was no proof that defect in stove caused fire.' Lezotte v. Lindquist, 51 S.D. 97, 212 N.W. 503, 504 * * *

"By negligence is meant the doing of some act, under the circumstances surrounding the fire involved, which a man of ordinary prudence would not have done, or the failure to do some act or take some precaution which a man of ordinary prudence would have done or taken.

"It is merely a convenient term under which to group a failure to conform to the standards of conduct insisted upon by society. We should consider whether probable harm to plaintiff's property could have been reasonably anticipated was within the range of defendant's conduct.

"The evidence of plaintiff fails to show the cause of the fire. There was no defect in the stove, stove pipe or chimney; there is no proof that any of the articles in the office room caused

the fire. When first discovered it was in the ceiling of the office and the roof above. The tin quart cans with screw tops on the floor, the unionalls hanging on the walls, the paper forms on the table and in the pigeon holes in the wall, the box on the floor * * * none of these are shown as connected with the fire or the cause of it.

"Assuming that the statements of defendant Hebel were competent, which we do not decide, they amount to admitting that he put some coal on the fire and went out for a cup of coffee; expressed an opinion the day after the fire to a question as to what the fire was attributed to, and that he had built a hot fire and went to the lunch room, and asked not to be quoted.

"On a cold night the ordinary use of a stove is to place coal in it and build a hot fire. There is nothing to show that the stove was overheated the night of the fire, nor that an overheated stove caused the fire. There could be many different causes for this fire. We cannot say it is unusual for Hebel to leave the office for a cup of coffee. The burden is on the plaintiff to prove that the negligence charged was the proximate cause of the damages, which this record shows was not sustained.

"The evidence introduced by plaintiff was insufficient to submit the case to the jury, and the separate motions * * * for a directed verdict * * * should have been sustained."

**A STOVE IS NOT AN INHERENTLY DANGEROUS ARTICLE AND THE "RES IPSA LOQUITUR" DOCTRINE IS NOT APPLICABLE.**

In the case of *McCabe v. Boston Consol. Gas Co.* (Mass.) 50 N.E. 640, it was held the doctrine of "*res ipsa loquitur*" did not apply. In that action plaintiff sought to recover for damages because of the explosion of a gas stove. Plaintiff bought the stove January 6, 1938, and on February 3, 1938, it exploded and damaged the property of plaintiff. Three weeks after the stove was installed plaintiff complained to defendants and they examined the stove but did not repair it. The plaintiff seeks to hold the defendants for negligence in *selling, installing* and *failing to repair the stove,* and the Court held,

> "There is *no evidence* that the *defendant* was the *manufacturer,* and apparently was not. The stove was not an inherently dangerous article and the defendant *is not liable for negligence unless* it knew or ought to have *known of its* defective nature. (Citations listed.) There was no evidence of leakage of gas before the explosion. In short, the cause of the explosion remains a mystery."
>
> "It is true that the plaintiff was not required to show the exact cause of the explosion * * * but the plaintiff had to show a greater probability that it *resulted from the defendants'* negligence than from a nonactionable cause. This in our opinion she failed to do."
>
> "In this case it cannot be said that *res ipsa loquitur* applies. The situation was not in the exclusive control of the defendant. *The charac-*

*teristics of the stove were determined by its manufacturer and its operation was in control of plaintiff.*" (Italics ours.)

We should bear in mind that the stove in the instant case was not manufactured by Galbreath and that he is sued for negligence.

In the case of *Le Zotte v. Lindquist* (South Dakota), 212 N.W. 503, appellants' building caught fire and consumed respondent's building and respondent recovered a judgment, which the Supreme Court of South Dakota reversed upon appeal. The respondent claimed that the fire started on appellants' premises at 11 p.m. by reason of a crack or check in the fire pot of a stove in a (V) shape, large enough to see the fire through; *however, it was not charged that fire or coals dropped from the stove by reason of this defect,* and the court held,

"Negligence is not presumed from the mere fact of injury, when injury is as consistent with unavoidableness as with negligence or when cause of accident is doubtful or injury can as well be attributed to act of God or unknown cause as to negligence."

"No presumption of negligence, either in the kindling or management of fire is raised by the destruction of property by it."

"In an action for fire which spread from defendants' building, brought on the ground that it was negligently caused by defective stove, held: that *doctrine of res ipsa loquitur* did not apply."

In the action of *Highland Golf Club v. Sinclair Refining Co.* (Iowa) 59 Fed. Supp. 910, a verdict was directed for defendant. The plaintiff owned a clubhouse on a golf course and defendants delivered gasoline into a barrel in the basement of the clubhouse near the pilot light of a water heater. A fire occurred without an explosion and plaintiff stated manner in which fire started was unknown to it. The Court held:

> "Apart from the statute, liability for damage caused to others by fire is based on negligence and one seeking to recover such damages has the burden of proving the negligence of the party charged."

> "The general run of cases where *res ipsa loquitur* is relied on are cases where the defendant is the owner or operator in charge and control of a premises and is being urged by a plaintiff who was on the premises for proper reasons. In the instant case it is the other way around, the owner and operator of a premises is suing a party who (by its servant) came onto the premises."

> "It would seem clear that when an owner of a premises orders merchandise delivered to such premises, that such owner does not intend to confer or does confer upon the deliveryman control over such premises or any portion thereof * * * it might be noted that the deliveryman *is an invitee,* and further noted that the owner of the premises owed to invitees the duty of using ordinary care to keep such premises safe."

"There is another feature to be noted in the instant case. There is no evidence of an explosion, there was only evidence that a fire started. In situations having to do with substances like gasoline, the line between an explosion and a fire is not always distinct and they are sometimes closely connected with each other. Apart from statute, the courts have been very reluctant and sparing in drawing an inference of negligence from the starting of a fire." (Citing many cases.)

"The courts recognize that fires are frequent occurrences and in a great many cases without any negligence on the part of anyone. Because of this the doctrine of *res ipsa loquitur* is applied only in exceptional cases in the causes of fires. If the rule of *res ipsa loquitur* were to be applied generally to fires, it would be obvious that the owner or tenant in control of a building in which a fire started would in a great many cases be held to a calamitous liability for a non-negligent occurrence."

*The supra case cites California authority.*

In the action of *Hendricks v. Weaver* (Mo.) 183 S.W. (2d) 74, a tenant sued the landlord for damages caused by the explosion of a stove and subsequent fire. The Court refused to apply the *res ipsa loquitur* rule and held, assuming that the evidence is sufficient to show an explosion took place, there is no evidence from which an inference can be drawn that the fire started from the stove or from the oil.

## CONCLUSION.

In conclusion it is submitted that the plaintiffs have failed to establish sufficient facts to enable them to rely upon the *res ipsa loquitur* doctrine. The evidence is lacking in the following particulars: there is no evidence to show that the fire was proximately caused by the stove; there is not a scintilla of evidence that the injury or fire was brought about by a cause for which defendant is responsible; and there is not an iota of evidence showing exclusive control in the defendant of the instrumentality causing the injury. It is, therefore, respectfully submitted that the findings of fact made by the lower Court are without evidentiary support and that the judgment herein should be reversed.

Dated, Sacramento, California,
May 12, 1950.

Respectfully submitted,
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